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Cr Cripps, C.R. The pre-sentence probation report
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C R I M I N O L O G Y

THE PRE-SENTENCE PROBATION REPORT

CHRISTOPHER R. CRIPPS

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CRIMINOLOGY

THE PRE-SENTENCE INVESTIGATION REPORT

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The Criminal Court, when passing sentence on a convicted person, must base its decision on the fullest possible information about the offender. It must consider not only the offence but the person who committed it. It is only after such a consideration that the sentence passed will be in the best interests of society and the accused person. Where will such information come from? Apart from the pre-sentence report, if called for, the courts must rely on the police, the prosecution and the defence to inform them. Such information is fragmentary and rarely objective. The pre-sentence probation report is a valuable source of additional factual information and psychological and sociological opinion. Judges and magistrates will also be assisted in the determination of an appropriate sentence by the recommendations usually contained in such reports. This paper will consider the role of the pre-sentence report in the modern criminal court with reference to its historical development, present form and usage and possible future evolution.

1. Historical Introduction and Aspects of Modern Practice

In 1886 the then Minister of Justice the Hon. Mr Tole introduced a Bill entitled the "First Offender's Probation Bill." He described it to the House of Representatives in the following terms:

> "I do not think I have ever introduced a bill in this House of such an important character as this.....Speaking generally it seems to me that the real text of the bill is this, that it is cheaper and safer to reduce crime or to reform criminals than to build goals."(1)

He went on to describe the special duties of the probation officers who would be specially appointed under the bill. One of these duties was -

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(1) New Zealand Parl. Debates 1886. Vol. 55 p. 507. Also see Mayhew P.K. "The Penal System of New Zealand, 1840-1924. (J.D.P.) p. 72

> ....."to inquire into cases to which this measure applies, and recommend deserving cases to the court, and the court may if it is satisfied that it is a first offence, instead of sending the offender to prison, let the convicted person out on probation."(2)

The general concept of probation had arisen as a substitute for imprisonment because of a gradual realization by the penal administrators of the time that prisons were not only expensive but ineffectual in achieving the aim of reformation rather than punishment. Little provision was made for classification within the prisons. Both first offenders and young persons were indiscriminately incarcerated with every likelihood that they would be reinforced and hardened in the pattern of offending by contact with other prison inmates. The 1886 Bill was based on a probation system developed in the United States in Boston, Massachusetts on a voluntary basis and officially recognized by the Probation Act of 1878. Probation officers were to make every effort to discourage their charges from re-offending and to assist them in every possible way. In New Zealand this principle was to be followed although the nature of the first appointees to the probation service (3) seemed to indicate that little serious effort was paid to the selection of suitable probation advisors. The Minister introducing the Bill stated that an appointed probation officer could hold office in conjunction with any other office. The "any other office" was, in practice, the chief goaler or senior police officer of the district.

Few offenders were to benefit under the provisions of the Bill. The First Offender's Probation Bill was, as its title implied, restricted to first offenders, and only to those first offenders who had not committed any of a specified list of the more serious offences. Despite these deficiencies the Bill was evidence of a growing movement towards penal reform. It passed through both houses of Parliament and became the First Offenders Probation Act of 1886.

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(2) New Zealand Parl. Debates 1886 Vol. 55 p. 507

(3) New Zealand Gazette 1886 pp. 1213 & 1285

Sections 6 and 7 read as follows:

Sec. 6 : "It shall be the duty of every probation officer -

1. To inquire carefully into the character and offence of every person arrested for any first offence, for the purpose of ascertaining whether the accused may reasonably be expected to reform without imprisonment;

2. To keep a full record of the results of his investigations.

Sec. 7 : It shall be the special duty of every probation officer, if satisfied upon investigation that the best interests of the public and the offender would be subserved by placing him upon probation, to recommend the same to the court trying the case."

These provisions are in essence the same as the present provisions governing probation reports under the Criminal Justice Act of 1954. However, it should be noted that there was a mandatory duty placed on the probation officer to inquire into every case which fell within the provisions of the Act (albeit first offences only) in contrast to the modern provision which states:

"A probation officer may, and shall when so required by any court report to the court....."(4)

Thus as far as pre-sentence inquiry went the 1886 Act was further reaching in this respect than the modern enactment. However, because of its limited application to first offenders, and its exclusion of serious offences, few offenders were able to benefit from the inquiry process. Furthermore there was dissatisfaction in some quarters(5) about the arbitrary nature of the reports prepared by the probation

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(4) Criminal Justice Act 1954 Sec. 4(1)

(5) New Zealand Parl. Debates 1898 vol. 102 p. 200

officers of the period. It was felt that the way sections 6 and 7 of the Act were framed, the sentence for the offence was in the hands of a policeman or goaler rather than at the discretion of the court. In particular there was no requirement that if an unfavourable report were to be tendered to the court, the probation officer should give reasons, in writing, as to the grounds on which such a conclusion had been reached.

Accordingly in 1898 section 7 was amended to read:

> "Whenever a probation officer does not recommend to the court, under section 7 of the said Act, that the best interests of the public and the offender would be subserved by placing him upon probation under the said Act, such probation officer shall state to the court fully and in writing the grounds upon which he refuses to make such recommendation, and the court may in its discretion make known to the offender the grounds of such refusal, and may receive such evidence in open court or otherwise, as the court shall think fit to admit to the truth or otherwise of any matter stated in the probation officer's report."

Whilst the safeguard of this amendment to the interests of the accused is readily apparent, the difficulties raised by it were a matter of concern to probation officers. Mayhew[6] records that the following expression of regret was received from the probation officer at Wanganui concerning the amendment:

> "I think it is a matter of serious regret that the Amendment Act of 1898 was ever passed, and I frequently find it difficult to elicit information from people, they fearing that they will be called in court to give evidence. It is, however, a matter which I am glad to say has not placed so many difficulties in my way as I anticipated, as none of the judges or magistrates

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(6) Mayhew op.cit. p. 80

presiding over courts here, with one exception, have thought fit to show either my reports to or subject me to cross-examination by defending counsel."

It is, of course, a principle of natural justice that reports of a potentially prejudicial nature must be disclosed to a party to judicial proceedings, who should be given adequate opportunity to dispute the information contained in them (e.g. see R. v. Bodmin J.J. ex parte McEwen [1947] K.B. 321). However, in exceptional cases, this principle may be set aside, as for example in custody proceedings, where the child involved could be harmed by the disclosure of information made in a report - In Re K. (an infant) [1965] A.C. 201. It could be argued that the probation officer's pre-sentence report falls into a similar category. If certain opinions are expressed in a report, the future relationship of probationer and probation officer could be severely harmed and since under the present administration of the Probation Service, the officer who prepares the pre-sentence inquiry is also the supervising officer at a later stage, if probation is ordered, the success of the judicial sentence could be jeopardized. Furthermore, because of the nature of the statements appearing in the report, including personality assessments, in some instances the disclosure of such material might be anything but beneficial to the accused. Whilst the decision In Re K (supra) illustrates that the courts will uphold such arguments in the case of the welfare of children, the serious nature of a criminal charge against an adult renders disclosure a necessity.

The 1898 Amendment, however, made the disclosure of reports discretionary. Some cases of apparent injustice did arise because of a failure to disclose the report(7) and in 1903 the First Offenders Probation Act was further amended to require disclosure of the probation report if the convicted person so required, before the court acted upon it. Section 3 stated:

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(7) New Zealand Parl. Debates 1903 vol. 123 p. 537

> "A copy of every report of a probation officer shall, if the person convicted, so requires, be given to him before action is taken thereon by the court, and he may tender evidence touching the same or any allegation therein."

It is interesting to note that both the 1898 and 1903 amendments to the Act do not indicate the highest confidence in the probation officers of the time if their language is any guide. Clauses such as ...."the court shall think fit to admit (evidence) to the truth or otherwise of any matter stated in the probation officer's report" and the use of the word "allegations" in the 1903 amendment reveals an element of disquietude about the authority of the reports made.

The next major advance in the legislative recognition of the value of the probation reports came with the passing of the Criminal Justice Bill of 1954. The Minister of Justice - the Honourable Mr Webb enunciated a most important principle when presenting the Bill - a principle that will be examined in detail in a later part of this paper. He said:

> "One point that the Bill emphasizes is that information regarding the offender, should be available to the courts because without that the courts are really not able to say what the sentence for that particular offender should be. It is in line with our objective, which is to ensure that the punishment will be made to fit the offender rather than the particular crime."

At this point one of his colleagues interjected, with one feels a certain amount of justification, to inquire whether this was not the practice at present.

The Minister replied:

> "It does not seem to have been entirely so. As a matter of fact, in this Bill as originally drafted, the provision was that before sentencing an offender to Borstal training or corrective

> training the court should have regard to reports of probation officers and that sort of thing. The Statutes Revision Committee went further, and, as the Honourable Members will see, the Bill, as it has come back from the Committee, says that the courts shall not impose certain types of punishment unless they have received and considered the reports of probation officers and the like. That provision will be found in clauses 19 and 22. They prohibit the court from passing sentence of Borstal training or corrective training unless it has received and considered one of these reports."(8)

It is difficult to understand why the Legislature was not prepared to go further. Under the Criminal Justice Act before passing a sentence of Borstal training,(9) periodic detention,(10) detention in a detention centre(11) or preventive detention(12) there is a statutory requirement that a probation officer's report be available, yet in cases where a normal sentence of imprisonment is involved the courts will not have to (and in a small number of cases do not) call for a probation officer's report.

The general provision regarding probation reports in the Criminal Justice Act is section 4(1) which provides that:

> "A probation officer may, and shall, when so required by any court, report to the court on the character and personal history of any person convicted of any offence punishable by imprisonment, with a view to assisting the court in determining the most suitable method of dealing with his case; and may in any such report advise the court whether the offender would be likely to respond satisfactorily to probation and whether any condition of probation should be imposed."

In view of the undeniable value of the probation report as a pre-sentence

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(8) New Zealand Parl. Debates 1954 vol. 304 p. 1929
(9) Criminal Justice Act 1954 section 19
(10) Criminal Justice Amendment Act 1962 section 15
(11) Criminal Justice Act 1954, section 16A
(12) Criminal Justice Act 1954, section 25.

guide to the court it is difficult to understand why there should be no requirement that a report be made available in every case where possible imprisonment is involved. Such a procedure is now a matter of practice in the Supreme Court although there is no statutory requirement, and under the Child Welfare Act a magistrate must have the report of a Child Welfare Officer available before hearing a case in the Children's Court.(13) It seems anomalous that a magistrate should have power to impose a sentence of imprisonment (maximum term, three years) without having to consult a probation report whereas if he imposes a term in a detention centre (maximum term, three months) there is a statutory requirement that a report be available.

In the modern court the earlier difficulties regarding disclosure are laid to rest by the provision of the Criminal Justice Act 1954.

> "Where.....(any) written report is made to the court by a probation officer, a copy of the report shall be shown, or if the court so directs shall be given to the solicitor or counsel appearing for the offender, or if not so represented, then to the offender."

(Sec.5) The Act further provides for the tendering of evidence on the report but adds the proviso that if in any case there is no disclosure the validity of the proceedings or the sentence passed will not be affected.

A recent case in the Magistrates Court - (Police v. Baxter [1970] 13 M.C.D. 162) dealt with some of the problems that can arise through disclosure of reports. The writer is informed that it is a matter of practice in some areas for a probation report to be shown or given by a probation officer to the defence. However in Baxter's case the magistrate criticised this practice. He stated (see p. 167) -

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(13) Child Welfare Amendment Act section 31(1)

....."However, in this particular instance, there was not any direction given by the court to the Probation Service, or any other person, that a copy of the report should be given to the solicitor or counsel appearing for the offender or to the offender. Such a course could not lawfully be followed until a direction from the court was obtained. I am aware that a different practice has arisen but am satisfied that the provisions of the Statute should be strictly fulfilled particularly as a copy of the probation officer's report is not as a general rule made available to the prosecution."

Thus it would appear that the words of section 5 - ("a copy of the report shall be shown, or if the court so directs shall be given") are now to be interpreted strictly so that whilst an offender will always be shown a report he may only be given it by direction of the court. It may be doubted whether this distinction has any validity. In Baxter's case the magistrate's chief concern was the fact that the report had not been made available to the prosecution but the decision has been rationalized on the basis that the accused might seek vengeance on those who had contributed information to the probation officer preparing the pre-sentence report. However, it is difficult to understand why this should not happen if the defendant were merely to be shown the particular report.

The Justice Department Probation Manual is an instructive guide to the circumstances in which strict confidentiality of probation reports should be departed from. It is now practice to disclose reports to the Police Prosecutor where the general part of the report refers to details of the offence, and, if the case is being heard in the Supreme Court, to show copies to the Crown Prosecutor. The manual instructs officers, in cases where disclosure to the police is objected to by counsel for the defence, to refer the matter to the judge or magistrate for whom the report was prepared. It is also the practice of the Probation Service to submit a copy of each Probation Report, prepared for a court, to the Secretary of Justice, and if the offender should be sentenced to a period of

imprisonment followed by probation or statutory parole or if there is a sentence of Borstal training, periodic detention or detention in a detention centre, two copies are to be sent to the Superintendent of the particular Institution. This apparently widespread disclosure of the report is open to serious objection because of the confidential details that may be contained within the report. It may be doubted whether many offenders would be prepared to confide intimate details of their lives if they could foresee the hands into which the reports would ultimately fall. It is suggested, in this respect, that the availability of reports to the police is particularly open to objection.(14)

In conclusion, it may be seen from this historical survey of pre-sentence reports and the comments made above concerning their use in the modern courts that there has been little significant change in the role of pre-sentence reports since 1886. Wider categories of offenders may now benefit from having a report available to the court before sentence is passed. The modern report is also prepared by a skilled probation officer and not by the police or a goaler. There has been a gradual development of the statutory provisions relating to disclosure, and the availability of a report is now mandatory in a large number of cases in which there will possibly be a custodial sentence (e.g. Borstal, detention etc).

2. <u>The Form of the Probation Report</u>

The Streatfeild Report(15) stated:

> "In our view a probation officer can helpfully, and properly furnish the court with -
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> (a) information about the social and domestic background of the offender which is relevant to the court's assessment of his culpability;

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(14) However see the opinion expressed in the Morison Report - Morison Committee on The Probation Service, 1962 (Cmnd 1650) H.M.S.O. at paras. 48 & 49.

(15) Report of the Interdepartmental Committee on the Business of the Criminal Courts Cmnd 1289 para. 335.

(b) information about the offender and his surroundings which is relevant to the court's consideration of how his criminal career might be checked; and

(c) An opinion as to the likely effect on the offender's criminal career of probation or some other specified form of sentence."

What is the general type of information that will be contained in the report? Obviously the depth and detail of a particular report will vary according to the individual case and the individual probation officer who has prepared it. (For examples see appendices A and B attached to this paper).

Briefly stated, the report contains a summary of the actual offence or offences committed and the statutory provision under which the charges are laid. In addition the previous offences with which the accused has been charged are included together with the convicted person's record, if any, from the Children's Court - including offences for which no conviction was recorded. (It should be remembered that at the stage when the probation report has been produced the determination of guilt or innocence is complete and the defendant will not be prejudiced by the production of his offending history).

The age, religion and nationality of the offender are also set down in the report, although data on religion is usually mentioned when it is relevant to the offence charged or has some bearing on the ultimate disposal of the case by the court. There is always a distinction made in reports between Maoris of more than half blood and Europeans - the official explanation for this being that the information is required for "statistical" purposes. The marital status of the accused is described and details of the immediate family of the offender are discussed especially in those cases where a juvenile is before the court including, when relevant to the offence, particulars of previous offending by

siblings or parents. Some care is taken to avoid the disclosure of certain types of information by which the defendant would be affected. Into this category falls the confidential material obtained from psychiatric hospital files, although more general medical and psychiatric reports may be included. Comment is contained in the report about previous employment of the accused with details of employers, the nature of the work attempted, the salary attached to the position, the duration of the employment and the reasons for leaving. The educational record of the defendant is also supplied in some cases.

Details of the offender's financial position are usually included in the reports. This may help in two ways -

(a) To gain a greater understanding of why the offence was committed. This will result from knowledge of the offender's debts and financial obligations and the extent to which these factors have motivated the offence.

(b) As an aid to assessment of a suitable penalty, especially where the defendant has no means. The Justice Department Probation Manual acknowledges the linkage between means and penalty when it states (commenting on financial reporting to the courts):

"This information is provided to help the court, particularly in cases where a financial penalty is provided for."(16)

It would be agreeable to believe that this information will always lead the courts to impose a lesser monetary penalty in cases where the offender is not in a position to pay a large fine. In practice, however, the consequences of inability to pay may be very different. The writer has heard a magistrate observe that a custodial penalty is appropriate when the offender has no means to pay a fine. Practical as this viewpoint may be, it tends to substantiate the criticism(17) that the poor before the courts suffer harsher penalties than those of more substantial means.

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(16) Justice Department Probation Manual para. 1.3.11

(17) For example see Tappan. "Crime,Justice and Correction" (1960) p.218

The Committee on Fines Enforcement[18] noted that at present the pre-sentence report was the only means at the court's disposal for complying with the provisions of section 45 of the Criminal Justice Act 1954 which states inter alia:

> "In fixing the amount of any fine to be imposed on any offender, the court shall take into account amongst other things, the means of the offender so far as they appear or are known to the court."

Obviously the wording of section 45 does not justify a court choosing an alternative penalty merely because of a lack of ability to pay fines. The Committee on Fines Enforcement[19] also noted objections to the use of pre-sentence reports as a means of obtaining information on the financial status of offenders. The already over-extended probation service is not structured to meet such additional demands on its time. Furthermore the primary objectives of the probation service would suffer if such a function were to be undertaken. It is important that the service retains its welfare orientation rather than becoming another administrative body.

The pre-sentence probation report ends with the general comments of the Probation Officer. These comments may be very brief and rather vague or a detailed analysis of the offender. The general aim of this section of the report is to draw together the factual statements referred to above concerning the circumstances of the offender and to draw inferences about the offender and his offence.

The Justice Department Probation Manual suggests the following headings which may be relevant under the general discussion.[20]

> "(i) His early childhood with the possible influences of his legitimacy, foster-parents, etc.

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(18) The Final Report of the Committee on Fines Enforcement (1970) para. 11

(19) supra para. 17

(20) op.cit. para. 1.3.12

(v) His relationships with his wife and children.

(vi) His leisure interests and associates.

(vii) His living conditions and his environment.

(viii) His employment record and any relevant comments by employers.

(ix) His resources and his financial obligations.

(x) His character and attitude. Opinions should not be stated as facts.

(xi) All the good that can be said of him.

(xii) The immediate causes of this offence.

(xiii) The effect of previous penal treatment. If the opinions of earlier probation officers, prison superintendents, etc., are known or pre-release reports are available, intelligent interpretation of them is essential, but:

(a) There must be no direct quotation;
(b) The opinion must still be relevant.

(xiv) Care should be taken not to make any positive assertion regarding intelligence unless the results of testing are available.

There are many other points which may be relevant and which should be mentioned under this heading, such as the prevalence or significance of the offence in your district. Information of a very personal nature

should not be mentioned unless it is relevant to the court in determining sentence." (See Appendices A and B for examples of actual reports).

It may be seen from these instructions that a rigid distinction is to be drawn between fact and opinion. However, there are dangers in the expression of personal opinion relating to the above mentioned headings without a background of experience or research in these areas. It is all to easy to fall into the expression of currently fashionable theories linking background and offence with methods of treatment without adequate evidence that there is in fact such a linkage. The Streatfeild Report (21) warned:

> "The probation officer would obviously have to exercise great care in forming, and expressing....an opinion, but subject to that, we think that he could properly deal with such matters in a probation report."

If, of course, the probation officer were to be confined to merely expressing factual information about the offender much of the value of the probation report would be lost. In most defended cases the facts are usually brought adequately before the court by a combination of prosecuting and defence counsel coupled with police reports.

In this situation the chief value will lie in the opinion expressed by the probation officer. In those cases where there is no defence the probation report will assist the court not only by providing a trained analysis of the defendant but by revealing factual details that might otherwise have been overlooked. This is a further justification for the wider use of probation reports.

In view of the fact that courts will place an apparently high degree of reliance on the opinions and other data in the report, any opinion given must be founded on sound training and a skilled appreciation of the

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(21) op.cit. para. 337

particular case. If this were not so the sentencing process based, in partial reliance, on the report would be just as arbitrary as that based on the skill of a single judge or magistrate. It has been stated that:

> "Objectivity is one of the essential attributes of a probation officer. Impartiality in his report writing will depend to a large extent on the degree of objectivity he has achieved - the trained and skilled probation officer will not read into situations what is not there."(22)

3. The Pre-Sentence Recommendation and the Court's Attitude

One of the most important parts of the probation report is the pre-sentence recommendation. In practice the making of such recommendations is subject to wide variations. Some officers prefer to make no recommendations whilst others will confine themselves to commenting on the suitability of probation. A smaller group of officers will recommend, in general terms, any appropriate sentence from the range available to the courts. This difference in approach indicates some of the uncertainties that surround the making of pre-sentence recommendations to the courts.

Whilst few would dispute the value of having a pre-sentence report available to the courts, containing factual details and other items which will help to provide the most comprehensive information about the offender, considerable controversy has arisen in respect to sentencing recommendations contained in the report. Some judges and magistrates tend to regard the making of such recommendations as a ursurpation of the judicial function and view them with considerable suspicion. Others adopt the attitude that the probation officer will know more than the judicial sentencer about the particular offender and will generally follow any recommendation he makes. There are also those who view the probation officer as an auxiliary counsel for the defence who will always slant his report and recommendation in favour of leniency.

(22) "The Pre-Sentence Report" Publication 103 of the Division of Probation - Administrative Office of the U.S. Supreme Court p.23

The writer has informally interviewed the magistrates of the Wellington Court (totalling five at the time of writing this paper) in an endeavour to ascertain their attitudes to sentence recommendations. The consensus of opinion was, that whilst recommendations as to sentence per se did not influence their final decisions greatly, the material which the report contained about the offender generally, was of assistance in imposing the most appropriate sentence. Indeed, some voiced the opinion that probation officers "force" magistrates to accept their recommendation by phrasing their report in such a way that the sentence recommended appeared to be the only logical solution. Few magistrates could claim that they were totally uninfluenced by probation reports.

The argument that judicial control of the sentencing function is being diminished by the practice of receiving pre-sentence recommendations, is fallacious. As Jarvis[23] points out -

> "There would be more strength in this argument if, in fact, the probation officer had an actual voice in the sentencing decision, but he has none. He merely gives an opinion if asked and this opinion may be accepted or rejected as the court wishes."

There is some evidence that the pre-sentence recommendation, when made, does influence the court's decision. A recent unpublished report of the Justice Department, "Recommending Sentence - A Study of Probation Officers' Pre-sentence Reports in New Zealand" studied all reports prepared in New Zealand between September 1968 and February 1969. The total number of reports was 3,157 and of these 371 reports contained no recommendation as to sentence. In the remaining 2,786 cases the courts had followed the recommendation made in 2,408 cases, so that in 86% of the cases where a recommendation had been made, it had apparently been accepted by the courts. I use the word "apparently" because it could be argued[24] that the courts would have reached a similar conclusion independently of the probation officers' recommendation. It is reasonable to suppose, however, that some degree of reliance will have been

(23) Jarvis - "Inquiry before Sentence" in "Criminology in Transition" ed. T. Grygier, H. Jones, J.C. Spencer (1965) p. 54

(24) Cripps "Pre-Sentence Reports" 6 V.U.W.L.R. 1972 p. 322

placed on the recommendation.

A factor which influences the recommendation that will be made in some cases, is the wording of section 4(1) of the Criminal Justice Act. A rigid adherence to the provisions of this section would permit the Probation Officer to recommend only -

> "Whether the offender would be likely to respond satisfactorily to probation and whether any condition of probation should be imposed."

In practice, the recommendations made are much wider than this, varying from fines to the imposition of imprisonment. Certain probation officers, however, observe the Criminal Justice Act and simply recommend "probation" or "not probation." This attitude may be motivated by a reluctance to recommend custodial sentences especially if the officers believe the courts will be likely to follow the recommendation made.

Despite the apparent limitations on the power of a probation officer to recommend sentences other than probation, the Justice Department Survey recorded the following types of recommendations and their frequency of occurrence.

Recommendation	Frequency	%
Imprisonment (more than 1 year)	142	5.1
Borstal training	149	5.3
Short-term imprisonment plus probation	28	1.0
Detention centre	137	4.9
Not probation (with no alternative recommendation)	661	23.7
Probation	980	35.1
Periodic detention	131	4.7
Fine	390	14.0
Deferred sentence	104	3.7
Remand section 37 Mental Health Act	43	1.5
Discharge	29	1.0
Total	2,794	100.0%

These categories may be slightly misleading without further qualification. For example "no recommendation" may suggest to the court that probation is not a suitable sentence and "not probation" with no alternative recommendation may indicate a term of imprisonment.

The highest proportion of recommendations made relate to the suitability of probation training but the widespread practice of recommending other types of sentence indicates that legislative reform of section 4(1) would be desirable. The courts would derive the greatest benefit from the recommendation if it advised the most suitable sentence rather than simply making a choice between probation or other forms of disposal. It might be argued that, at present, the section is sufficiently vague in its wording to allow a wider recommendation range but it is suggested any uncertainty should be removed. The Streatfeild Report recommended(25)

> "Although a probation officer has no concern in the administration of these other sentences and has no general responsibility for what they achieve, his knowledge is valuable to the courts because it is knowledge of what happens when the offender is released from custody and is exposed to the strains and pressures which liberty brings. At some courts, probation officers have accordingly come to deal in their reports, particularly those on young offenders, with the likely effect of other forms of sentence as well as probation, and we agree that where the probation officer can express a reliable opinion about these other forms of sentence, it will often help the court. Even if the probation officer is of the opinion that probation stands a good chance of benefiting the offender, the court cannot overlook the possibility that some other sentence might be equally, or more beneficial."

However the Morison Committee(26) was not so enthusiastic when it came to assess the role to be played by a probation officer in relation to the likely effects of sentence. It was felt that even the most skilled and experienced officers would be untrained to make such forecasts and that

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(25) op.cit. para. 341

(26) op.cit. para. 41

present methods of research were not yet sufficiently developed to enable the probation officer to reliably predict the likely effects of a sentence. However the Committee did admit that it was beyond its powers to fully investigate this area and concluded on a note of expediency that:

> "The comprehensive knowledge of the Penal System which the exercise of such a function would require would add very considerably to the content, and probably the length of training."

The writer shares the opinion of the Streatfeild Committee that further research in this area is necessary to determine the suitability of probation officers expressing an opinion as to the likely effect of sentence. It is suggested that the present attitude displayed in New Zealand is over-cautious in that there is a reluctance to spell out areas of probation officers' duties. In the United Kingdom the corresponding legislation is more specific. The Criminal Justice Act 1948 (U.K.) provides that:(27)

> "It shall be the duty of probation officers to supervise the probationers and other persons placed under their supervision and to advise, assist and befriend them to inquire in accordance with any directions of the court, into the circumstances or home surroundings of any person <u>with a view to assisting the court in determining the most suitable method of dealing with his case</u>."

In contrast to sec. 4(1) of the New Zealand Act the underlined words illustrate the wider approach to pre-sentence recommendation possible under the English Act. King (et al)(28) points out that the practice of the English courts varies considerably in the interpretation of the above-mentioned section, especially in relation to the expression of opinion by probation officers. She quotes the Lord Chief Justice as expressing

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(27) Criminal Justice Act 1948 (U.K.) fifth schedule sec.3(5)
(28) "The Probation Service" ed. J. Kind London (1958)

the view that where a probation officer knows an offender the court may well ask his opinion on treatment and in these circumstances a full and honest opinion should be given, although the responsibility for the decision as to sentence still remains with the courts. The author also points out that the training and working conditions of a probation officer do not allow him to become familiar with forms of treatment other than probation. Although this comment is justified to a certain extent, the probation officer in New Zealand usually has quite extensive experience in the treatment of individuals who have been through penal institutions and in some areas maintain close liason with particular institutions. In some cases probation officers are actually attached to the institution (for example Mt. Eden Prison).

Provided that the particular probation officer can adequately justify the reasons for his assessment of the case it is unlikely that any harm will result to the offender and the positive result may be that the wider experience of the probation officer in dealing with offenders at all stages of sentence will be of assistance to the court. In New Zealand the report tendered to the court will sometimes go further than a bare recommendation as to sentence and concern itself with the likely effects of the sentence (other than probation). For example if the marital situation of the defendant is a stabilizing influence, the probation officer may mention that a custodial sentence is likely to destroy this and that the best solution is to impose a fine. There may even be a suggestion that a fine which is imposed should not be too great to enable the accused to meet other commitments, especially if the offence was originally related to difficulty in meeting such commitments. This is a practice which should become more widespread but there is some resistance amongst magistrates to concerning themselves with the likely effects of sentence. An indication of this is the fact that the Justice Department makes reports available to magistrates on the progress of persons they have sentenced to institutions (Borstal is the best example). Only two of the five magistrates interviewed by the writer at the Wellington court expressed a willingness to study these reports. The remainder felt that their part in the sentencing process was completed in the court room.

However, to ensure the most effective sentence, surely the results of that sentence must be taken into account. The knowledge of how certain individuals respond to certain sentences will be a guideline to future sentencing. Although the reports presently available relate only to the response of the convicted person to the sentence being served rather than longer term surveys of post-release adjustment, there should be more judicial interest in this area of sentencing. In this atmosphere it is understandable that probation officers are reluctant to express opinions regarding the effects of the sentence in particular instances. The Streatfeild Report(29) noted that judicial reluctance in this area was unjustified provided that the opinion of the probation officer is expressed on a reliable and relevant basis of information.

The actual recommendatory part of the report involves a wider consideration of the possible sentence to be given to the accused. In particular the following questions are raised:

(a) Should a probation officer be required by statute to make a pre-sentence recommendation?

(b) Should the pre-sentence recommendation be confined only to the suitability of probation, ignoring other forms of sentence?

(c) Should opinion as to the effects of a possible sentence be expressed in addition to the suitability of the sentence?

As far as question (a) goes it is obvious that at present a mandatory probation report in all criminal cases would be impractical if not undesirable and unnecessary. In the year ended December the 31st 1970(30) a total of 10,576 probation pre-sentence reports were prepared of which 9,720 related to proceedings in the Magistrates Court, 457 in the Childrens Court and 399 in the Supreme Court. It is interesting to note that during the same year there were 453 criminal trials in the Supreme Court (coupled with 121 Committals for Sentence) whereas there were

(29) op.cit. para. 344
(30) Report of The Department of Justice presented to the House of Representatives (1971) p. 30.

300,775 criminal charges including traffic offences heard in the Magistrates Court. If traffic offences are excluded from this consideration along with Childrens Court appearances (where there is a mandatory requirement that a Child Welfare Officer's report be available), it will be seen that pre-sentence reports were prepared in only ten per cent of all criminal cases approximately, (because probation reports will be prepared in relation to the more serious offences in the traffic category). One of the major arguments against mandatory reports in every case would be the intolerable increase in the work load of an already severely strained probation service. The Justice Department report cited above quotes a 1969 survey which reveals that the average field officer prepares 9.5 pre-sentence reports a month, although in some centres this may be as high as 18.(31) This is in addition to an average of 50 distinct cases per 10 working day period involving supervisory case work. Even these figures are substantially below the present work load. If there is to be a mandatory requirement that probation reports be prepared in criminal cases as a pre-sentence guide to the court, where must the dividing line between the necessity and the option of having a report available be drawn? In an earlier part of this paper it is mentioned that such reports are now mandatory before a sentence of Borstal training, periodic detention, detention in a detention centre or preventive detention is passed. All Childrens Court cases require the report of a Child Welfare Officer and the Supreme Court usually demands such reports as a matter of practice rather than law.

It would be desirable if probation reports were called for in all cases where the offence was punishable by imprisonment. It should be stated that most magistrates would invariably require a report if a prison sentence was contemplated but some have, on occasions, imposed a maximum sentence(32) without the aid of a probation report despite Supreme Court disapproval of this practice.(33) One magistrate interviewed claimed that he had imposed a three year sentence without a probation report so that a "sharp and immediate shock" could be administered to the offender who had been arrested a short time before.

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(31) Gibson "Measurement of Probation Officers' Work Load" - Justice Department Report (1969) unpublished.

(32) The maximum term of imprisonment able to be imposed in the Magistrates Court is three years.

There are many arguments in a similar vein which magistrates put forward to justify proceeding to a prison sentence without a pre-sentence report. For example the case is posed where there is a persistent offender who has been fined, then put on probation several times and finally imprisoned. In this situation would a probation report serve any useful purpose? To argue along these lines overlooks the factors that a probation report may reveal, existing as the cause of offending. There may be an impediment to the offender's reformation which has recently arisen (e.g. in family circumstances) or which makes a prison sentence inappropriate. No matter how persistent or serious the offender or the offence may be the courts should always seek a better understanding of the individual. The best method of achieving this understanding is through the use of a probation pre-sentence report - even in cases where a magistrate is in doubt whether imprisonment should be imposed at all, for example where the offence is trivial, the use of a pre-sentence report is still important as it may give a guide to the appropriate penalty (e.g. fine or probation).

At the very least there should be requirement that before a term of imprisonment is imposed, a probation report should be available thus bringing the practice of the courts in this situation into line with the statutory requirements for other forms of custodial sentence. Arguments relying on the increased expense involved, the delay or the burden on the probation service, overlook the gravity of the decision being made. Imprisonment is the gravest sanction our society can level at one of its members. The consequences of even a short term sentence can be socially disastrous not only to the offender but to his family and eventually to the community in general. A decision to deprive an individual of his liberty should never be made lightly and should be based on the widest possible knowledge of the case in question. In England the Streatfeild Report laid down as a primary rule that -

> "A sentence should be based on comprehensive and reliable information which is relevant to the objectives in the court's mind."

(33) Re Moulin [1947] NZLR 322 at 327.

How can any magistrate, acquainted only with the facts brought before him in the normal course of judicial proceedings, claim that he has "comprehensive and reliable information" before him when he imposes sentence? Therefore a statutory modification to the Criminal Justice Act should deprive the court of its present discretion to dispense with the probation report in cases which involve a possible sentence of imprisonment. This would not be a usurpation of the sentencing function of the court nor would the actual recommendation of the probation officer be mandatory. The final decision on sentence would still rest with the bench. If pre-sentence reports were to be made a statutory requirement in the circumstances outlined above the answers to questions (b) and (c) posed should logically follow in the affirmative. This paper has already discussed why the sentence recommendation range should be widened and why the possible effects of a sentence should be included. If one proceeds on the assumption that the pre-sentence report is valuable because it provides comprehensive data not normally available to the bench, then this data should not be limited merely because some members of the judiciary entertain prejudices more appropriate to the nineteenth century. For the modern sentencer to advance the claim that the courts are discharging their sentencing responsibilities in a manner beyond reproach, there must be a ready acceptance of all information which can properly relate to the discharge of this most important judicial function. Therefore the pre-sentence probation report should be welcomed rather than merely accepted, with the courts making every effort to relate the contents of the report to the final treatment and disposal of the offender. Only then could the courts claim, in the words of the Streatfeild Report, that all offenders were receiving a sentence "based on comprehensive and reliable" information.

4. Pre-Sentence Reports and the Present Judicial Process

When considering the future role of the pre-sentence report it is instructive to examine the existing use made by the courts of these reports.

Despite the apparent reluctance of some judicial officers to call for pre-sentence reports, there has been a steady increase in the number prepared each year. In 1965 there were 5,859 reports prepared for the courts and this number rose to 9,211 in 1969 with a further increase to 10,576 in 1970. The high correlation between sentence recommendation and actual sentence passed (86%) has been discussed above but as may be expected there is considerable variation throughout the country in the manner in which the courts react to pre-sentence recommendations. The Justice Department Report gives statistics relating to the ratio of recommendations followed in different areas. For example in Magistrates Court Centre A (a North Island town) 22.7% of the recommendations made by probation officers were not followed whereas in Magistrates Court Centre B (a South Island town) only 4.5% were not followed. Even more interesting is the manner in which the courts dealt with cases where the recommendations were not followed. In Court Centre C (North Island) where 21% of all recommendations were not followed the Justice Department Report shows that 18 out of 29 cases were dealt with more severely than recommended. In Court Centre A (supra) however, only 2 out of 20 cases were dealt with more severely. It is apparent that a considerable amount of latitude remains with a court which has received a recommendation and this would not be diminished if pre-sentence reports and recommendations were to be made mandatory in certain cases. The final exercise of discretion would still remain with the courts.

The court also noted that judges of the Supreme Court tended to follow recommendations to a greater degree than did magistrates and also called for reports far more frequently. The Report included 14 judges and 38

magistrates and whereas only four of the judges did not follow every recommendation, all of the magistrates,had, at some stage, departed from pre-sentence recommendations. This of course could be due to several factors. The enormous volume of cases passing through Magistrates Courts renders a divergence of opinion between magistrate and probation officer more likely than in the limited number of cases dealt with in the Supreme Court. It may also be suggested that Supreme Court judges have more time to consider pre-sentence reports and appreciate the comments made in them in comparison to the magistrates. Furthermore, because the offences heard by the Supreme Court tended to be more serious than those in the Magistrates Court the range of possible sentences will be narrowed considerably. A recommendation for a custodial sentence might be expected in these circumstances and there will be a high correlation between recommendations and sentences. It might also be expected that probation officers preparing reports for the Supreme Court would take more care in composing the report and thus the reasons for following any recommendation made would be more cogent.

Amongst magistrates there is some concern that probation officers orientate their reports to the needs of the individual offender rather than the community. This may result in comparatively few recommendations for custodial sentences. For example in Court Centre C, cited above, the Justice Department Report showed that prison was recommended in only 2% of all cases compared with 16.5% in a neighbouring North Island Centre. It could be postulated that a probation officer's failure to recommend a certain category of penal measure will lead to a general distrust of his recommendations. Thus in Court Centre C the rather high proportion of 21% of all recommendations were not followed and 18 out of 29 cases were dealt with more severely than recommended. Unfortunately, the Justice Department Report does not indicate whether those cases which were dealt with more severely resulted in prison sentences being imposed in place of a non-custodial recommendation. When it is considered that pre-sentence reports are usually called for

in cases where prison sentences are being contemplated, 2% of prison recommendations appears to be a very low proportion and the particular magistrate may have had some justification in departing from the recommendations in a significant number of cases. Care should be taken by probation officers not to appear biased against certain penal measures. Recognition of the value of pre-sentence recommendations and reports, by the judiciary, would increase if there was a more widespread belief that the probation service was completely impartial and unbiased, in the preparation of such reports.

As indicated above, the writer informally interviewed Wellington magistrates to gain some impression of their attitude to pre-sentence reports and in particular to the recommendations as to sentences contained in them. There was a wide divergence of opinion but common factors in attitude did emerge. These were:

(a) A willingness to override recommendations in certain cases;

(b) A satisfaction with the pre-sentence report generally (subject to qualifications which will be discussed below);

(c) A concern that pre-sentence recommendations displayed leniency;

(d) That there was insufficient awareness of public policy and interest when making recommendations;

(e) A dissatisfaction with the content of reports made by certain probation officers.

The survey covered the five magistrates sitting in the Wellington Magistrates Court at the time of writing this paper.

Magistrate A expressed the most extreme view. He stated that he never deviated from his own opinion in the face of a conflicting recommenda-

tion in a probation report and felt that in most cases pre-sentence recommendations were a waste of the court's and the probation officer's time. Although he admitted that the probation officer might have acquired expert knowledge in his own field the superior experience of a magistrate who was continually involved in the sentencing process outweighed that of a probation officer when sentence was passed. Magistrate A conceded that in a few cases the contents of a probation officer's report could provide additional aid to the court where relatively little was known about the offender but this magistrate claimed in some cases to have a "personal" knowledge of the offender and in the majority of others to rely on the factual information adduced by the police, prosecution and defence. This magistrate also said he was not interested in the likely effects of sentencing and felt that his function ended with the sentence passed. It was his duty to serve the public and consideration of the individual interests of offenders was a secondary concern.

In direct contrast to this attitude, magistrate B expressed the opinion that a probation officer was an expert both in dealing with and understanding convicted persons and accordingly that if there was a conflict between his personal opinion and the recommendation in the report he would generally follow the latter. However, he said that in most cases he entirely agreed with the recommendation stated in the report and the reasons put forward in support of it. In common with all the magistrates interviewed Magistrate B did not wish to see a statutory requirement that probation reports be made mandatory in any specified sentencing situation. His personal practice was to call for a report in every case where he contemplated imposing a term of imprisonment.

The remaining magistrates were more conventional in their approach to the pre-sentence report. They indicated a willingness to deviate from the sentence recommendation when they felt it was in error and to display a flexible approach to pre-sentence reports. Magistrate C indicated

that he often found psychological data contained in the report to be a useful aid. In addition he valued the reports as a supplement to the general information available to the courts. He felt, however, that the pre-sentence recommendation had to be treated with caution, as there was no attempt made to consider wider aspects of the sentencing function, including public policy. (Section 4(1) of the Act, set out above, contemplates a consideration of the individual offender alone).

This criticism raises again the question of how wide the opinion contained in a pre-sentence report should be. If the expression of opinion is to extend into the area of public policy a certain danger would be apparent. How would a probation officer gauge the public interest in a particular case? In this area it might validly be argued that the sentencer is equally, if not more, qualified to take such considerations into account. The pre-sentence report is only of value if it supplies information not otherwise available to the court. Whilst factual, sociological and psychological data may be outside the province of a magistrate, the consideration of public policy is equally beyond the concern of a probation officer.

Magistrate C, apart from expressing concern relating to the basis on which pre-sentence recommendations were made, also felt that the courses of action recommended displayed an unconscious bias on the part of the probation service. He felt that the probation service was orientated towards the interests of the accused rather than a complete and impartial survey of the case and thus moved towards leniency in their recommendations. This attitude seems to agree with the findings of the Justice Department Report. In areas where there was a low frequency of imprisonment recommendations there was a loss of judicial confidence in the reports reflected by a greater than usual frequency of judicial failures to follow such recommendations. Magistrate C felt that the probation service displayed a general desire to keep persons out of prison and that this was reflected in the recommendations made. He suggested that his own attitude also

varied in relation to the particular officer who had prepared the report, more reliance being placed on some opinions rather than others. He stated that if in some cases there was a substantial doubt raised in his mind by a probation officer's recommendation, he would discuss the recommendation further with the particular officer before passing sentence. Magistrate D felt that the majority of pre-sentence reports were helpful and estimated that he would follow such recommendations in 90% of all cases. However, generally the major defect of such recommendations was that they fell on the side of undue leniency. If there was a conflict between his own opinion and that contained in the recommendation Magistrate D felt that his own experience in sentencing gained from many years on the bench was preferable to that of the probation officers.

Magistrate E found the pre-sentence report most useful in cases where there was simply a plea of guilty with few facts available. He stressed the fact that he viewed the probation officer as substitute defence counsel in such cases and valued the wider view that the pre-sentence report offered of the facts. As far as the actual sentence recommendation went, he expressed the commonly held opinion that these erred on the side of leniency and that a wider community viewpoint had to be looked at rather than individual considerations. Often the facts contained in the report were "loaded" in such a way that one was led inevitably towards the recommendation and therefore, with certain officers in particular, he viewed even the general contents of the report with some reserve. Despite this his own opinion usually coincided with that contained in the recommendation. Magistrate E displayed a similar attitude to pre-sentence recommendations as that identified by Jarvis[34] in the English courts. He states:

> "It is recognized that some benches, even today, are inclined to see the probation officer's report in the light of a plea or at least an argument for leniency and are not able to accept it as an impartial appraisal of the offender and his situation."

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(34) op.cit. p. 53

The Justice Department Probation Manual lays down the following rules concerning the pre-sentence report.

> "The purpose of the report is to assist the court to come to a decision as to sentence which is, as far as possible, in the best interests of the community and of the offender. It should neither be a plea for the offender nor an indictment of him; it should include the favourable no less than the unfavourable; it should be a balanced assessment and should distinguish quite clearly between fact and opinion. There is, therefore, a need for careful checking of factual information as to its accuracy and the careful evaluation of opinion as to its relevance and merit."

It should be noted that the instructions stress the interests of the community as well as the offender. In view of the considerations discussed above it may be questioned whether this is a correct appreciation of the proper role of the probation service. However it may be confidently expected that the courts will increasingly acknowledge the vital role of pre-sentence reports and other expert opinion in the judicial process of sentencing and that present difficulties in overcoming the prejudices of the bench in the acceptance of pre-sentence advice will be eliminated.

A striking example of a more enlightened approach may be found in the case of R. v. Douglas(35) when the question of whether corporal punishment should be imposed on a person convicted of robbery arose. The judge took the unusual step of calling for psychiatric and criminological opinion before sentence was passed; he stated:

> "I am refraining from doing anything in the way of exercising my discretion until I have some information as to the principles and materials on which the discretion should go. I want guidance the same as we get on sentence day from psychiatrists and welfare workers. I need guidance on this matter."

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(35) (unreported) See discussion of this case in a Aust. & N.Z. Journal of Criminology (1968) p. 18

In passing judgment, he continued by discussing the English attitude to the receipt of probation reports and reports from experts before sentence and cited with approval an inaugural lecture of Professor A.R.N. Cross which pointed out the need for further education of judges in their sentencing function. Judge Rapke then continued:

> "Well, that was the background on which I thought to myself that if it is good enough for English judges to look to criminologists and psychiatrists for assistance, I, who have no special qualifications to know when and where whipping should or should not be ordered, except that I remembered that it was used in the dim history of Australia when classes saw fit to follow the example set in England, should look to the criminologists and psychiatrists to assist this court."

These statements are of course exceptional for their candour and advanced approach to sentencing. Similar judicial sentiments are rare. The outstanding judicial statement on the proper attitude to be taken by the courts to the sentencing function in New Zealand in respect of pre-sentence recommendations may be found in Re Moulin [1943] NZLR 322 at p. 327. The Chief Justice Sir Michael Myers said:

> "There is one point that I have mentioned in previous cases which has not been observed in this case and which I feel bound to refer to again. The magistrate in this case did not have a probation officer's report before him when he sentenced the offender. I think I am right in saying that except when a sentence is fixed by law, a Judge of the Supreme Court never sentences a prisoner to a term of imprisonment or reformative detention without having a probation officer's report before him. The reason is simple. No matter what the prisoner's previous criminal record may be, and no matter what the Police or Crown Prosecutor may say of the offender's character as

gleaned from the police records, there is always the possibility of the careful inquiry which the probation officer is expected to make resulting in the obtaining of some information which might dispose the court to a more lenient sentence[36] than might have been imposed without such information. It is not right in my opinion, that any court should sentence a person to a long term of imprisonment - in this case twelve months' reformative detention - without having had the opportunity of considering a report from the probation officer.

In the case of one Rowe in May 1941, the offender was sentenced by a magistrate to a lengthy term of reformative detention. The offender was of doubtful mentality, but he was sentenced without the magistrate having either the probation officer's report or any report as to the offender's mental condition. In a memorandum dealing with the case I said:

> "I have had on a previous occasion or occasions to draw attention to the sentencing of a prisoner by a magistrate to a lengthy term of reformative detention upon material which would not in the absence of further information be acted upon by a Judge of the Supreme Court. I consider it my duty to point out that if the prisoner had had to be dealt with by the Supreme Court, I have no doubt that both a probation officer's report and a report as to the prisoner's mental condition would have been called for before sentence, and not left to be obtained afterwards by the revising tribunal. In dealing with the liberty of the subject in these cases, magistrates should exercise no less care than is exercised by the Judges of the Supreme Court."

I understand that a copy of my memorandum was sent to each magistrate for his information. It is the duty of magistrates to act upon pronouncements of this court in matters of this kind, and it is surprising to find still an accused person being sentenced to a long

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(36) The Chief Justice conveys the unfortunate impression that the reports will tend towards leniency.

term of reformative detention without a report from the probation officer."

Unfortunately although most magistrates are mindful of their duties in this area, the examples quoted in other parts of this paper reveal that observance is not scrupulous. Another example of judicial recognition of the value of a probation officer's report may be found in R. v. Halliday [1958] NZLR 1041 at p. 1045 when the Court of Appeal considering a sentence of imprisonment which had been passed on a youthful offender stated:

> "After saying that the appellant gave the impression of being a lad of average intelligence, quiet, respectful and very conscious of his present position, and that he was described as a good and willing worker, the probation officer went on to say: " He is in need of supervision, and I feel that in his present frame of mind a period of probation would achieve the desired result."

While the court is in no way bound by the recommendation of a probation officer, his report serves a valuable purpose in assisting the court to assess the character and personal history of the offender, as it is based on inquiries and information not otherwise available to the courts."

However, despite such expressions of judicial approval, unqualified acceptance of the desirability of having pre-sentence reports available, at least in cases involving possible prison sentences, is not a present reality. It may be that in our overcrowded magistrates courts expediency will be the primary consideration. (There is some evidence that magistrates in the Auckland area are not calling for pre-sentence reports in certain circumstances to relieve the pressure on the probation service).

Before leaving this section mention should be made of a further apparent anomaly in the wording of the Criminal Justice Act which has a bearing on the final recommendation made. Jeremy Pope[37] writing in the New Zealand Law Journal, points to the provision in section 4(1) that requires a person to be convicted before a probation report may be called for. He suggests that once a conviction has been entered it is no longer possible to discharge the defendant under section 42 (without conviction) although this is done in practice. The writer agrees with his conclusion that the wording of section 42 coupled with that of section 4(1) works to prejudice and not to protect the defendant's interests and the pre-sentence recommendation could, by a suitable amendment to section 4(1), be called for when the court is satisfied that the charge is proved and not subsequent to conviction.

Despite apparent statutory obstacles in the way of a recommendation in favour of discharge, the Justice Department Survey reveals that out of 2,749 specific recommendations studied, 29 or approximately 1% recommend discharge. Thus the absolutely rigid application of the Criminal Justice Act by both the court and the probation service is avoided in practice. There is no direct evidence available to indicate how great an inhibiting factor the exact statutory rules have been in the preparation of wide ranging sentence recommendations but as pointed out above there is some data which tends towards showing that certain probation officers feel bound to recommend probation alone without a wider consideration of courses to be followed. Also the Law Reports reveal, that at least in relation to pre-sentence reports, some sentencers are inclined to take an unnecessarily rigid approach to the application of statutory provisions (for example see Police v. Baxter cited in this paper).

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(37) [1971] N.Z.L.J. 496

5. The Attitude of the Probation Service Towards Pre-Sentence Reports and Recommendations

Having considered judicial attitudes towards these reports it is equally important to attempt to gain some insight into those of the probation service. There are conflicting orientations in this area. Whilst on the one hand there is justifiable concern that the courts should not pass sentence without calling for a pre-sentence report, there is anxiety about becoming identified with the sentencing function of the court. The service does not desire direct participation in this sphere. Several reasons are advanced for this. Some officers simply express repugnance at becoming involved in sentencing others. Another prevalent opinion is that if the officer is believed by an offender to be responsible for the sentence received, a subsequent relationship, if the officer should later have to supervise him on probation, will be prejudiced. In this respect an argument might be advanced for dividing the probation service into Court Reporters and Post-Sentence Supervisers. This would avoid an officer preparing a report on a subject and later supervising him. There would be some disadvantages in this approach. The personal knowledge gained by the court reporter would be lost if a new relationship had to be established after sentence. Also it is by no means clear that resentment exists in every case. Indeed, many officers subsequently establish excellent relationships with offenders who realize that the probation officer has played some role in the sentencing process. Furthermore, the recommending officer would no longer be able to recommend probation treatment with assurance. At present he can recommend probation knowing that he will supervise the offender. On this basis he can assess the likely effects of probation. If another, unknown officer, was to supervise, his approach might be very different with the chances of successful treatment being diminished. On the other hand such a division would rationalize the objectives of the probation service to a certain extent. Greater efficiency could be achieved by having one group of officers preparing reports, with another group functioning as case supervisors only.

The conflict between the social work function of the probation officer and his position as an officer of the court would then be diminished. At present probation officers realise that there is a high degree of probability that their recommendation will be followed, especially in certain specialized areas such as Adult Periodic Detention. In some cases it could be theorized that the very low ratio of recommendations for custodial sentences might be attributed to reluctance to assume responsibility for the actual sentence passed in view of the court's known reliance on the recommendation. This reluctance, as shown above, tends to discredit reports generally in the eyes of sentencers.

A case could be made for the introduction of special reporters attached to each court who would be removed from the probation service but who would, in effect, investigate the areas presently covered in pre-sentence reports. Their duty would be to analyse the background and circumstances of the particular offender and on the basis of this analysis to recommend to the court the most suitable sentence. This solution would again avoid role conflict with the court reporter gaining specialized knowledge in a single area. However, the possibility that such specialization would involve the abandonment of the skills that play a large part in the preparation of present pre-sentence reports cannot be ignored. Contact with offenders after sentence would be absent and thus the value of recommendations as to sentence would diminish. Direct attachment to the courts would tend to create a concern for legal rules and practice which would inhibit statements made in reports. It is believed that much of the present value of the pre-sentence report lies in the wide experience of the probation officer in all aspects of the sentencing process especially the post-sentence phase.

The next question that must be considered is the methods by which probation officers arrive at their recommendations. Naturally this will vary from officer to officer but statistics contained in the Justice

Department Report on pre-sentence recommendations give some insight into these processes. For example analysis of recommendations made for periodic detention shows that these are most often made where an offender has four or five previous convictions although for offenders with substantially larger numbers of convictions the likelihood of such a recommendation remains the same. The Survey also points to the fact that a recommendation for periodic detention will depend upon the availability of this form of disposal in the particular area. Again, because of the service's close connections with the administration of this form of sentence, a greater understanding of its possible uses and applications may be expected.

Similarly with Borstal training the likelihood of this form of sentence being recommended is greatest when an offender has four or five previous convictions but in contrast to periodic detention its appearance as a recommendation diminishes sharply thereafter. It may be postulated that probation officers regard Borstal training as the final step in a young offender's criminal career before graduation to imprisonment. If, after several previous convictions this form of treatment is applied without success it is fruitless to continue it. However with periodic detention (especially adult periodic detention) the sentence is more directly punitive in nature with little pretence at treatment and therefore is more suitable as a repetitive sanction.

In general custodial sentences were found by the survey to have been applied in 16.3% of all the cases studied and that, as might have been expected, sentence recommendations for custodial treatments were greatest when the offender had several previous convictions. (50% of the offenders included in the survey sample had more than three previous convictions). The results of analysis of offences against property, show that previous convictions for such offences make it more likely than a recommendation for a custodial sentence will result. The proviso to these figures, contained in the report, should be noted. Only the frequency of the convictions was recorded rather than their actual type of offence. Obviously if the particular categories of

offences committed were serious in nature the rapidity of progression of sentence recommendations towards imprisonment would be greater. Interestingly, in view of the observations made above concerning reluctance to recommend custodial measures, the frequency of such recommendations varies substantially between districts. For example in North Island Centres A, B and C the recommendations in favour of custodial measures were 28.8%, 29% and 31.9% respectively, whereas in North Island Centre D and South Island Centre A the frequency was 8.3% and 8.6%. However, one of the districts with the highest proportion of custodial recommendations and one with the lowest, both had the highest proportions of recommendations not actually followed. In relation to custodial measures the report indicated that young offenders were proportionately more likely to receive a recommendation for a custodial sentence than older age groups but it was noted that this may be due to the greater measure of custodial treatments available for young offenders.

Another relevant area traversed by the report to the Justice Department is those reports (371 out of 3,157 studied) which had no recommendation as to sentence. These were found to be most prevalent in reports to the Supreme Court although there was evidence that the frequency of "no recommendations" varied according to the judge who had called for the report. (For example three judges always received a specific recommendation in contrast to one judge who received nine out of ten negative conclusions in reports prepared for him). It might be observed that the process mentioned by magistrates above of placing reliance on reports made by certain officers, probably works in reverse with officers being reluctant to advise certain magistrates or judges on possible sentences. It is unfortunate that this mutual distrust should exist, if indeed it does exist, but the wide variations in attitudes to sentencing both amongst the judiciary and the probation service would seem to render this inevitable. The Justice Department Survey identifies another factor which may lead to a "no sentence recommendation" being made (apart from indecision!) and this is that it may be an indication that imprisonment is warranted. (The more

serious the offence committed, the less likelihood of there being a specific recommendation). Sex offences, proportionately, had the highest frequency of "no recommendations."

It is dangerous to draw specific conclusions from such statistical analysis, as the reasons for a particular officer's recommendations depend on many variables which cannot be analysed. However the probation service seems willing to be flexible with sentence recommendations for first and non-serious offenders. In the case of those with more convictions the recommendation process seems to be inhibited, with recommendations for those with three or more convictions becoming static (i.e. on imprisonment) or with cessation of specific recommendations entirely. The Justice Department Survey concludes on this aspect that "it would be of value to investigate the actual decision making process by which probation officers arrive at their recommendations."

The difficulties in undertaking a general survey into such a subjective area would be a daunting but, this writer believes, a necessary step if pre-sentence reports and recommendations are to assume greater significance, on a rational basis, in the judicial process.

6. Conclusion

Observations on the Future Role of the Pre-Sentence Report

With the greater realization by sentencers that their training and experience is insufficient to adequately determine all factors surrounding sentencing, a more ready acceptance of pre-sentence and other external reports may be expected. The judgment in R. v. Douglas cited above illustrates the beginnings of such a judicial awareness. There are, however, still many inadequacies in the practice and procedure of obtaining pre-sentence reports and recommendations, due in the main

to judicial conservatism, and fear that the judicial prerogative of the sentence will be encroached upon. Those members of the judiciary who do entertain such thoughts would do well to look to the example of countries like the United States where certain jurisdictions (e.g. California)[38] are experimenting with the complete removal of the sentencing process from the courts to special sentencing tribunals. This is the ultimate progression in sentencing, but a progression which would not be absolutely necessary if there was a willingness to receive and analyse on an informed bases reports from experts. It is also believed that the ambit of the present pre-sentence report could be extended especially in relation to the area covered by the recommendation.

In summary form, legislative intervention is desirable in existing statutory requirements:

(a) To make the preparation of the pre-sentence report mandatory in every case involving a possible term of imprisonment.

(b) To make the acquisition by the court of a report dependant not on conviction but on merely hearing the charge and being satisfied that it is proved.

(c) To specifically extend the types of recommendation that may be made beyond opinions as to the suitability of probation.

(d) To specifically allow the expression of an opinion by a probation officer as to the likely effects of sentence.

(e) To remove present absurdities relating to the "showing" of probation reports instead of the handing over of such reports to the defence.

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(38) Jappan op.cit. p. 461

Also change in a less tangible manner is required, not in statutes but in the attitudes of those involved in the sentencing process both judicially and probation service alike. On the part of the former, there should be ready acceptance and a willingness to be informed by the report and its recommendations whilst the probation service should feel free to cast off unwarranted hesitancy and inhibitions (which may be justifiable in the fact of the judicial attitude) especially in the preparation of sentence recommendations. A movement towards this could be achieved by divorcing the sentence recommender from the probation supervisory role as outlined in this paper.

The modern judicial sentencer must have complete knowledge not only of the offender but of possible treatment measures. When it can be stated (as the writer has discovered) that certain sentences are not imposed by particular magistrates merely because they have been overlooked or forgotten, then it can be queried whether the courts should be permitted to continue in their sentencing function armed only with the talisman of the previous judicial experience of sentencers.

Another development that may be hoped for is the wider acceptance of reports other than by probation officers. At present medical and psychiatric reports are consulted, in many situations before sentence, to gain some measure of whether a particular sentence will be suitable for the offender. In special situations the admission of reports from experts in other fields could prove invaluable to the courts. The case of R. v. Douglas shows that even the opinion of the criminologist may find judicial acceptance and favour. Whether in the final analysis the court, aided by outside opinion, will impose a more suitable and efficient sentence is a matter of conjecture. Expert reports, even if they express no opinion or the opinion contained in them is rejected, are invaluable if only for the factual detail presented to the court which may not be available from other sources.

Increased acceptance of probation pre-sentence reports and mandatory

requirements for such reports in specified areas will necessitate an efficient probation service able to supply the different courts with the necessary information. It is time that the probation service received an adequate staffing allowance and rates of pay commensurate to the importance of the tasks that it undertakes. Once the courts and indeed the community generally, realize fully that the so-called "common sense" and experience of the judicial sentencer are inadequate to meet the demands of a modern criminal jurisdiction, the search for possible alternatives could rest with the pre-sentence report, both of probation officers and other experts, before going on to the more rarified heights of treatment tribunals and related substitutes for the single judicial sentencer.

APPENDICES

The following pre-sentence probation reports are examples of different methods of approach to the preparation of these documents. They are based on actual reports but have been altered in certain respects as to names, dates and places to protect the interests of the parties concerned.

APPENDIX A

The Presiding Magistrate,

Magistrates Court,

WELLINGTON.

REPORT ON: JOHN JAMES O'DWYER

8 BARNES TCE., WELLINGTON

For sentence on 6 December, 1968

OFFENCE: Theft as a Servant

Crimes Act 1961 Section 227 (b) (ii)

Maximum Penalty: 7 years' imprisonment.

PREVIOUS OFFENCES: Nil

AGE: 54 years BORN ON: 27.8.1914 AT: Wellington

NATIONALITY: N.Z. (E)

FAMILY: Father: SHANE O'DWYER, boilermaker, died in 1915 at the age of 39 years.

Mother: NINA O'DWYER died in 1928.
O'DWYER is the fifth of a family of five sons, two of whom are deceased.

MARITAL STATUS: Married.
Wife: NANCY O'DWYER, 50, housewife, same address.

O'DWYER has three daughters and two sons whose ages range from nineteen to thirty years. All are married except the youngest, a daughter, who is to be married in January.

HEALTH: Generally good. Occasionally suffers from gout.

EDUCATION: Marist Brothers, PETONE, to age 14.

EMPLOYMENT: Apart from a few month's working as a delivery boy when he first left school, O'DWYER has worked for the complainant firm, R.J. SMITH & Co., for his whole working life of some forty years.

FINANCIAL: O'DWYER has been earning $47-00 clear a week. Savings amount to $1600 and he has no debts. Rent for his State House is $45-00 a month. He will receive about $2000 as a result of his superannuation contributions.

REPORT ON: JOHN JAMES O'DWYER

GENERAL:

O'DWYER was born in 1914 and was the youngest of a family of five sons. His father died before O'DWYER'S first birthday and the responsibility for bringing up the family became the mother's. His mother died when he was fourteen, the age at which he left school and started work.

When O'DWYER began his working career the country was entering a time of economic depression and it was a few months before he could find permanent employment. However, he was still only fourteen when he joined the complainant firm and had completed forty years' service when he was dismissed for the present offence. At the time of his dismissal he was foreman of a department in the factory. A good worker, normally he would have retired at the age of sixty in about six years' time and his superannuation would have been worth some $7400. As a result of his dismissal the value of his superannuation is reduced by over $5000.

O'DWYER was married in 1937 and he and his wife have raised a family of five children. All but one of the family are married and there are some grandchildren now. The family life appears to have been satisfactory and O'DWYER'S wife has always found her husband to be a good provider. Recently there have been some added worries as one son has been seriously ill, and the youngest of the children, a daughter, has become pregnant and has to get married.

Outside his family O'DWYER has few interests. He plays some social cricket and during the winter he enjoys watching football. He drinks and concedes that at times he drinks more than he can afford.

Regarding the offence, O'DWYER made no excuses. It was a planned, deliberate arrangement based on O'DWYER'S particular function in the factory and aimed at making money. It is difficult to understand why he

should have become involved when he had so much to lose, but it would seem that he has something of an obsession about being financially secure which could stem from his somewhat deprived childhood and his experience of financial hardship during the early thirties. Ironically his attempt at making more money has placed him in the position of insecurity he was trying to guard against.

After a hitherto blameless life O'DWYER at the age of fifty-four comes before the Court on a serious charge. His life to date has been typical of so many people that it is difficult to find anything to say about him. He has worked steadily and consistently, raised a family, and generally lived an ordinary, law-abiding life. In a sense by his offence he has negated all these solid achievements and the repercussions of his offence are likely to be severe. Though he is a first offender, because of his age and circumstances probation is not recommended and the Court is asked to consider imposing a monetary penalty.

L.J. Stevenson,

Probation Officer.

APPENDIX B

The Presiding Magistrate,
Magistrates Court,
WELLINGTON.

REPORT ON: ROBERT CAREY

of: 8 WANDSWORTH ROAD, WELLINGTON

OFFENCE: Arson

PREVIOUS OFFENCES:

23.1.34	M.C. Christchurch	Obscene exposure	To come up for sentence if called on within 1 year.
1.2.35	S.C. Dunedin	Assault with Intent to Rob.	3 years H.L.
		Discharging fire-arm with intent to harm.	3 years H.L.
		Attempted murder	7 years H.L.
		Assault	9 months H.L.
		Attempted Suicide (2 charges)	1 month H.L. on each

(Released from prison on licence 23.3.44)

AGE: 62 years **BORN ON:** 5.8.1906 **AT:** Greymouth

NATIONALITY: N.Z. (E) **RELIGION:** Presbyterian

FAMILY:

Father: James CAREY, farmer, died 1955 aged 92.

Mother: Anne CAREY, died 1953, aged 85.

The offender is the third in a family of four:

Brother: James CAREY (67) retired farmer, of Herne Bay, Christchurch.

Sister: Mrs ENDER (65), of Christchurch.

Brother: Allan (59) retired Post Office employee, of Wellington.

MARITAL STATUS: Married twice:

I. to KAY SMITH in about 1951. The couple separated after about 6 months and were subsequently divorced.

II. To MARGARET FLINDERS in 1962. Mrs CAREY went to visit her mother in Worthing, England, in February 1969. It is not known whether she will return to N.Z. There are no children.

REPORT ON:ROBERT CAREY

EDUCATION: Attended Thames District High School, leaving when 14 years old.

EMPLOYMENT: It is impossible to give a complete or comprehensive account of CAREY'S employment and it has not been possible to interview any of his previous employers. However, his statements are in general corroborated by his brother.

For the first few years after leaving school, CAREY worked as a farm hand. Later he joined the Merchant Navy and served for some 3 years as a steward and galley hand on overseas vessels. For about 20 years CAREY was self-employed as a travelling salesman, taking goods including drapery, hardware and patent medicines, by car to most parts of the country, and apparently doing quite well financially. CAREY also worked in Wellington for a short time as a steward or porter in some of the hotels but subsequent changes in personnel make it impossible to obtain confirmation.

About 7 years ago, CAREY purchased a block of 4 flats in Christchurch, one of which was occupied by the offender and his wife, the rest being leased out, providing sufficient income to support them. This property was sold in about 1967 when they moved to Wellington. Since then they have been dependent solely on the offender's pension.

HEALTH: In January 1938, the offender attempted suicide by firing a revolver. The bullet pierced his cheek and entered his mouth, but has not apparently caused any permanent damage.

While serving a sentence of imprisonment the offender's foot was crushed by a truck. The wound healed but the offender complains of discomfort and inconvenience as a result.

The offender has smoked very heavily for many years and complains of pains in the chest. He has not however consulted a doctor and is apparently apprehensive as to what might be revealed by a medical examination.

FINANCIAL: CAREY has freehold possession of a property at 8 WANDSWORTH ROAD, acquired in December 1967 for $11,000. He claims to have spent $2,000 on improvements to the property, which appears to be reasonable. The house is very well furnished, most of the furniture being new, and includes a piano, for which he paid $480. CAREY has some money invested with Lamphouse which he estimates at about $4,500.
His motor car was taken by his wife when she travelled to England in February this year.

The offender's only income is his pension.

GENERAL:

The offender is a very lonely person. He has virtually no friends, he does not belong to any organisations or particpate in any social activities of any sort, and other than tradesmen, the only person he meets regularly is his younger brother. For the purpose of this report, it has been necessary therefore to rely largely on the offender's own statements which are in general (if not in detail) corroborated by his brother, and in certain aspects, by his solicitor, MR R.J. STANHOPE.

The offender comes from a respected farming family. It seems that the home was a happy and united one, and that relationships between the various members were healthy. The parents lived to a ripe old age, their children combining to care for them in their latest years. The offender's sister and brothers did well for themselves, although the offender feels that he did not do as well as the others, none of whem has ever appeared in Court. It seems that he was regarded, and indeed regarded himself, as the "odd man out" in the family, but no explanation could be suggested for the difference in temperament and personality between CAREY and the others.

In 1935 CAREY was sentenced to 7 years' hard labour for a series of offences in which a revolver was used. It would appear that the offences arose out of his frustration at being unable to establish an emotionally satisfactory relationship with a young woman. During the period of 6 years that he spent in prison, CAREY was examined by psychiatrists, whose report confirms this view, stating that CAREY appeared to be emotionally unstable, but that there was nothing wrong with him intellectually. This prison sentence naturally prevented CAREY from participating in World War II, in which both of his brothers were actively engaged, and this has been a constant source of shame and embarrassment to him, and it is moreover a subject on which he is bound to be questioned repeatedly in all innocence.

Although he has worked for comparatively short periods as a farm hand, as a steward or galley hand in the Merchant Navy, and as a lounge steward or porter in Wellington hotels, for most of his working life CAREY worked on his own account as a salesman. He would obtain goods (drapery, patent medicines and hardware) from wholesalers with whom he had established a sound relationship, and travel throughout the country selling his wares mostly to back-country farmers. It is apparently a way of life which he found congenial. He lived very frugally, and in this way was able to accumulate sufficient funds to invest in a block of flats in Christchurch in about 1961 or 1962.

The offender married for the first time in 1951, a young woman he appears to have regarded as somewhat his superior. The marriage was however of only short duration, which he attributes to his protracted absences from home in the course of his business. He returned from one of his tours to find that she had left him, and they were eventually divorced. Eleven years later, CAREY married a woman who for some years previously had been boarding with him for a nominal rent. His feelings towards this woman are characterised by an extreme degree of ambivalence, and from all accounts the marriage has brought little comfort or happiness to the offender and has aggravated his personality problems, rather than assist him to overcome them.

CAREY'S wife was of English origin, but was sent to New Zealand by her mother at an early age, where she was cared for by an aunt. She was apparently mentally unbalanced and it is known that in December 1947 she was admitted to Oakley Hospital where she was certified in the following month. It seems that CAREY married her out of sympathy and from a need for companionship, rather than from any other feelings, and mentioned that on only one occasion, right at the commencement of their marriage, did he have intercourse with her. Although better educated and more cultured than CAREY she was liable to irrational and unpredictable behaviour, which included violent outbursts, and aninability to settle down in one place for long.

After giving up his nomadic existence as a travelling salesman, CAREY purchased a block of flats in Christchurch, one of which was occupied by his wife and himself, while they lived on the rent from the other three. This arrangement was brought to an abrupt end to please his wife, and the property was sold. After negotiating for the purchase of a residente in a select suburb of Christchurch, which ended with the loss of the deposit he had paid, they moved to Wellington where eventually he purchased the property in WANDSWORTH ROAD, about 2½ years ago.

The present home is built on a very steep section and CAREY has spent considerable money and a great deal of effort in improving his property, and in furnishing the house. It seems that his wife did not really appreciate the home he had provided and it bears the marks of damage caused by her in her violent outbursts. During 1968, the aunt by whom she had been brought up in New Zealand, died, leaving her a legacy of a few thousand dollars. Without informing her husband, MRS CAREY, used these funds to obtain a passage to England for herself. The first CAREY knew of her impending departure was when workmen came the day before she was to embark, to pack her luggage. She took with her to England much of the household property, including china and cutlery, and even shipped CAREY'S motor car.

The offender was naturally most upset by this sudden and unexpected departure of his wife, and the loss of his car and other property. He received some letters from her after her arrival in England and at first he expected she would return to him in New Zealand. MRS CAREY stayed at first with her mother and an aunt, although her latest letters indicated she was living spearately from them. As time progressed, her letters became less frequent and finally ceased and it now seems that CAREY has accepted that she has probably gone for good. When this conclusion was reached CAREY decided to sell the property, and travel himself to England to join his wife there.

Accordingly, CAREY sought the assistance of a Land Agent, but although many persons came to inspect the property, he received very few offers for

it, and these for considerably less than he hoped for. CAREY became increasingly frustrated at his position and formed the belief that the structure close to his house, which was dilapidated and unsightly, as well as cutting off afternoon sun, was the reason for his inability to sell.

CAREY, at the age of 62 years, has the appearance of a person considerably older. As his history indicates clearly, he is emotionally unstable and with a poor tolerance of frustration, and there is little doubt that this obscures his actual intellectual capacity. The house and section are kept by him in impeccable condition and indeed it is understood that CAREY'S wife was an extremely poor housekeeper, and that he was always responsible for keeping their home clean and tidy. Although hurt by his wife's sudden departure, CAREY misses her company acutely. He has no friends and no-one, apart from his brother, whom he sees only occasionally, with whom he can discuss his problems and disappointments and who could assist him to work out a solution.

It is difficult to make any constructive recommendation to the Court. There is no doubt that the offence was committed while the offender was subject to (what for him, was) a quite intolerable degree of strain. Provided he is not subjected to similar stress in future, it is unlikely that he will offend again and the Court may perhaps consider that the ends of justice would be adequately served, were he to be ordered to come up for sentence if called upon within 12 months and ordered to pay reasonable compensation. It is however, understood that CAREY is now represented by Counsel and that an application will be made to the Court for permission to change his plea.

A.M. Findlayson,

Probation Officer.

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A.M. Tindlayson,
Probation Officer.

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